No.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 41[illegible], AFL-CIO,

v.

NATIONAL LABOR RELATIONS BOARD.

## PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Eighth Circuit.

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No. .....

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

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INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 1140, AFL-CIO,

v.

NATIONAL LABOR RELATIONS BOARD.

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

International Hod Carriers, Building and Common Laborers' Union of America, Local 1140, AFL-CIO, herein called the Union, prays that a writ of certiorari issue to review the opinion (A-1-15, *infra*), and decree (A-16-19,

*infra*) of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 22, 1960, and January 19, 1961, respectively.

## OPINIONS BELOW.

The opinion of the Court of Appeals is not yet officially reported. The decision and order of the National Labor Relations Board (A-20-31, *infra*) is reported at 127 NLRB No. 74.

## JURISDICTION.

The decree of the Court of Appeals was entered on January 19, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED.

1. Whether an order framed in the prohibitory language of Section 8 (b) (4) (i) and (ii) (B) of the NLRA, as amended, improperly interferes with primary picketing where the order is designed and construed to prohibit all construction site picketing of a non-union subcontractor in support of the Union's demand that he sign a legal prehire contract.

2. Whether a Union's statements to a neutral general contractor that it will continue to picket the non-union subcontractor at the construction site until the subcontractor either signs a union contract or is removed from the project constitute threats, restraint and coercion outlawed by Section 8 (b) (4) (ii) (B).

## STATUTE INVOLVED.

The statute involved, Section 8 (b) (4) (i) and (ii) (B) of the Labor Management Relations Act of 1947 as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.; P. L. 86-257, 73 Stat. 519) now provides that it shall be "an unfair labor practice for a labor organization or its agents:"

> (4) (i) to engage in, or to induce or encourage [the employees of any employer] *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [,]; *or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce*, where *in either case* an object thereof is:
>
> (B) *forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or* forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*"

The italicized language was added to, and the bracketed language was excised from, Section 8 (b) (4) (A) and (B) of the NLRA by the 1959 amendments.

## STATEMENT.

### 1. The Uncontroverted Facts.

Simpson Company is an acoustical and insulation contractor on construction projects (R. 3; 23). In the regular course of its business it employs laborers to unload and transport materials delivered to Simpson for installation (R. 24). Because Simpson "never know[s]" when "cars of material * * * will arrive," it employs "spot laborers" on a day-by-day basis, as needed (R. 18, 24). Simpson's regular practice is to pick up such laborers at the office of the Nebraska Unemployment Bureau; they work as long as the job lasts; their services are then terminated and they are paid off by Simpson's truck driver (R. 18, 24). These laborers are not union members and Simpson pays them less than union scale (R. 22, 24, 25, 32).

On November 20, 1959, materials were delivered to Simpson at the South High School construction project on which it was then engaged and, as usual, it hired non-union day laborers to do the unloading (R. 24). When Richard Otte, one of the business agents of the Union, came to the job site that afternoon he told these laborers to stop work and go home, which they did (R. 3; 19, 22, 26, 27). Ray Watson, a truck driver for Gilmore, the general contractor on the project, was then also unloading a truck. He was being assisted by Joe Tripp, a member of the Union (R. 27-28). Otte approached Tripp and told him to stop work and go home, simultaneously telling Watson that "he didn't care what I did" (R. 28; see also Tr. 54). Watson, at the hearing, identified Tripp as an employee of Gilmore, but there is no direct evidence in the record that Otte knew that Tripp was not an employee of Simpson.[1] Tripp is the only employee of Gilmore or

[1] The court below found (A-11, *infra*) that the circumstances were such as to cause "any prudent person to at least make further inquiry before pursuing the rather drastic course followed by Otte." Petitioner does not challenge this finding.

of any subcontractor other than Simpson whom a Union agent is even claimed to have asked to cease work during this entire controversy.

After paying off his laborers, who then left the job site (R. 18, 20), Simpson's foreman approached Otte and asked what "we have to do to keep from having a picket put on the job?" (R. 3; 21). Otte replied that Simpson would have to pay all the day laborers for eight hours, and "sign a contract with the Union" under which Simpson would be bound to hire all laborers through the Union hiring hall. *(Ibid.)* Later that afternoon the Union began to picket Simpson at the job site with signs reading (R. 3-4; 22, 32):

SIMPSON CO.
REFUSES TO PAY
UNION WAGES
& CONDITIONS
LABORERS LOCAL 1140
THIS DISPUTE WITH ABOVE
EMPLOYER ONLY

At no time did any picket approach any employee of Gilmore or any other subcontractor with a request that they refrain from crossing the line (R. 33). The only person, who as far as the record shows, asked a picket about crossing, Otto Narduzzo, a foreman for Narduzzo Construction Company, was told by Otte to cross. *(Ibid.)* Nevertheless, once the picket line was established, no employee of any of the employers on the project crossed it to go to work (R. 4; 21).

On Saturday, November 21, Otte called Van Scoy, an official of Gilmore, to tell him what Gilmore "could do to prevent pickets being on there Monday morning" (R. 4; 32). He explained the basis for the Union's demand that Simpson pay the day laborers who had worked on

November 20, "for eight hours at $2.32½" and said that Simpson "would have to sign their Union Contract and hiring hall agreement" (R. 4; 32). Van Scoy then called Simpson and asked him "what he wanted to do" (R. 33). Simpson replied that "he was willing to pay union rates but that they would not sign their contract." (*Ibid.*) Then and there Van Scoy and Simpson agreed that if Simpson needed any more laborers for its work on the project, Gilmore would supply its own men, who were members of the Union, to do it (R. 26, 33). On Saturday, Simpson called Otte and, in response to Otte's statement that Simpson "would have to sign a contract" replied: "We have no contract with the Carpenters; we have no contract with the Lathers; no trades that we do work with, and I see no reason why we are required to have a contract with the Laborers when we do not hire laborers as a general rule" (R. 25).

On Monday, Van Scoy approached Otte on the picket line, told him of Gilmore's arrangement with Simpson under which "we would take care of any labor work after that time that Simpson might have to do" and asked him if the picketing would stop (R. 33). Otte replied that it would not. (*Ibid.*) Van Scoy then asked, "What do we have to do" to stop the picketing? (R. 33); and Otte replied (R. 34): "You will have to get AGC contractors to black-list Simpson and not allow him on any of your jobs." When Van Scoy said, "You are kind of picking on us, putting us in the middle," Otte answered that if "any other contractor in Omaha had Simpson on his job and he had non-union laborers that he would picket the job just the same as he has ours". (*Ibid.*) A week after the picketing started, and after Gilmore had filed its charges with the Board (R. 1, 12), another Union business agent, Schaeffer, called George Gilmore to express his "surprise" that Gilmore was "suing the Union . . .

after we had had such good relations all through the years." Gilmore asked, "what else we could do to get the pickets off" and Schaeffer answered that Gilmore could either induce Simpson to sign the same Union contract which Gilmore had signed, which contained a hiring-hall clause, or "run Simpson Company off the job" (R. 29).

## 2. The Board's Findings and Order.

The Board found (A-25, 26, *infra*) that the Union had "'induced and encouraged' secondary employees to cease work." It predicated that finding on two facts: (1) "Otte's instruction to secondary employee Tripp to stop working" and (2) "the picketing continued after the primary Simpson employees were no longer on the job and Respondent had been told by Gilmore that they would not be used on the job again."[2]

Although it was uncontradicted that both Otte and Schaeffer told Van Scoy and George Gilmore that the picketing would stop if Simpson signed a union contract, the Board described them as stating that the picketing would stop "only if Gilmore removed Simpson from the job." It concluded that by these statements the Union had coerced and restrained Gilmore, a neutral employer, in violation of the newly added Section 8 (b) (4) (ii) (B), and had also revealed that its picketing "had the unlawful 'secondary boycott' objective * * *, i. e., to force Gilmore to cease doing business with Simpson" (A-26, *infra*). Finally, the Board found that because the Union demanded that Simpson sign a union contract at a time when the Union was not the certified bargaining agent of Simpson's

[2] The Board reasoned that upon arranging for Gilmore's employees to do his unloading work Simpson ceased to be engaged "in its normal business at the common situs" within the meaning of the fourth *Moore Dry Dock* requirement (A-25, note 4, *infra*).

laborers, its picketing "had the unlawful 'recognition' objective of Section 8 (b) (4) (i) and (ii) (B)" (A-26, *infra*).

The Board concluded that by its inducement of Tripp, its picketing of Simpson and its statements to Gilmore officials the Union had "violated all parts of Section 8 (b) (4) (i) and (ii) (B)" (R. 7). It entered an order, in the prohibitory language of those Sections, requiring the Union to cease and desist from the violations found.[3]

The order contains no language exempting from its ban any picketing of Simpson at the South High project or elsewhere.

### 3. The Court's Opinion and Decree.

The court did not adopt the Board's contention that by removing his laborers from the project Simpson prevented the Union's picketing from satisfying the **Moore Dry Dock** tests (A-7-9). It held, however, that those tests are not "the single guide for our decision" as to the legality of the picketing; they are only "evidentiary in nature and they are to be employed in the absence of more direct evidence of the intent and purposes of the labor organization". In this case there was "ample direct and uncontradicted evidence pointing to the intent of Union" in picketing Simpson, *i. e.*, its inducement of Tripp

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[3] On the theory that petitioner had threatened "to involve other employers in the future" and had "committed similar violations" in the past, the Board did not limit its order to neutral employers on the South High project or to action arising out of the Union's dispute with Simpson, but enjoined petitioner from violating Section 8 (b) (4) (i) and (ii) (B) generally (A-28-29, *infra*). While approving the extension of protection to "any other employer" in connection with the Simpson grievance, the court below limited the scope of the order to action taken pursuant to that grievance (A-14-15, *infra*). No question concerning the propriety of this aspect of the order is here presented.

to cease work and its attempts to induce Gilmore to remove Simpson from the project (A-9, *infra*).

The court held that because the Union's motive in picketing was thus established "we need not determine the area of Union's rights, as against Simpson, the primary employer * * *"(A-12, *infra*). Accordingly, it rejected the Union's contention that the order should be modified to exempt picketing of Simpson, stating that "the order is designed to prohibit only that conduct which is proscribed by the statute, that is, picketing or striking for an unlawful purpose. We cannot perceive of anyone suggesting that the order can rationally be construed to prohibit lawful primary picketing or lawful primary striking" (A-13-14, *infra*). Since, in the court's view, Congress did not intend by Section 8 (f) to legalize picketing for a pre-hire contract (A-11, *infra*), the order's prohibition of all picketing against Simpson for the purpose of compelling him to execute such a contract could not trench upon picketing preserved by the proviso to Section 8 (b) (4) (ii) (B), for the proviso protects only "lawful primary picketing" (A-14, *infra*).

## REASONS FOR GRANTING THE WRIT.

1. Just as **NLRB v. Denver Bldg. Council**, 341 U. S. 675, and **International Brotherhood of Electrical Workers (Langer) v. NLRB**, 341 U. S. 694, because they exemplified and reflected the Board's initial approach to "common situs" picketing, were appropriate companions to **NLRB v. International Rice Milling Co.**, 341 U. S. 665, so is the instant case, because it exemplifies and reflects the jettisoning of that approach, an appropriate companion to **Local 761, International Union, Etc. v. NLRB and General Electric Company**, No. 321, this Term, certiorari granted, 364 U. S. 869. **Local 761** subjects to review the

Board's new approach to the "an object" test, under which some picketing previously held primary is now held secondary. See Brief for Petitioner in No. 321, pp. 50-53, 61-62, 69-91. This case offers for review that aspect of the Board's new approach under which cease and desist orders in common-situs cases are now construed as prohibiting all picketing of the primary employer.

Couched in statutory language, the order ostensibly prohibits only picketing which violates the ban against secondary boycotts and their inducement. But the order is predicated on findings that the picketing of Simpson with signs publicizing the Union's primary dispute with him at a construction project where Simpson is engaged in making installations itself violates the Act.[4] Read in light of the opinions, the decree prohibits the Union, because it has violated the Act in the past,[5] from engaging in any construction site picketing of Simpson in the future. Thus, the Union is prevented from inducing employees of Simpson's suppliers to refrain from making deliveries to him and Simpson's employees to refrain from working for him.

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[4] That the Board found the picketing itself a violation appears from its express holding p. 7, n. 2, *supra*, that the picketing became illegal after Simpson removed his laborers from the project, as well as from its finding that the picketing was illegal because the Union sought to accomplish "unlawful objectives," *i. e.*, to force cessation of business and to obtain recognition.

[5] For purposes of review petitioner concedes that its inducement of Tripp was properly found to violate Section 8 (b) (4) (i) (B) and that this violation warranted entry of a cease and desist order. For the purpose of the first question only, petitioner also assumes that the statements of its agents to Gilmore were properly held to violate Section 8 (b) (4) (ii) (B), and that the order prohibiting violation of that section is also valid. The first question presented, accordingly, is whether a cease and desist order may stand without modification where, as here, it is construed to prohibit peaceful picketing of the primary employer in support of the Union's primary demand.

So construed, the order eradicates "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes". **NLRB v. Denver Bldg. Council**, 341 U. S. 675, 692. Effectuation of "the dual congressional objectives" as defined by this Court in the **Denver** case, *ibid.*, requires that the Union's right to picket Simpson be preserved. **System Federation No. 91, Etc. v. Wright**, 364 U. S. 642. Conformity with the newly added proviso to Section 8 (b) (4) (B), and with the principles of this Court's decision in **NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 232-233, requires that the reservation appear on the face of the decree. **McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, Etc.**, 2 Cir., 280 F. 2d 760, 764, 765 and No. 228, decided February 8, 1961, 47 LRRM 2541.

Under the Board's initial approach, approved in the **Denver** case, picketing at a common situs insofar as it conformed to the **Moore Dry Dock** rules, was primary as a matter of law. The Board held that where a union "by its picketing signs or by its conduct elsewhere indicates that the dispute extends beyond the primary employer, and thereby directly seeks to enlist the active participation of employees of neutral employers", it violates the Act *only* to the extent that its conduct does not conform to those rules. Brief for the Board in No. 321, this Term, p. 34. Accordingly, the "usual cease and desist order" which the Board issued in such cases was construed to allow the union thereafter to picket the primary employer at the common situs "so long as it makes clear that its dispute is with" the primary employer only. **General Teamsters, Chauffeurs and Helpers, Local Union No. 249 (Crump, Incorporated)**, 112 NLRB 311, 312. To enjoin "similar [unlawful] acts in the future" was the "only appropriate remedy"; picketing in conformity with the **Moore Dry Dock** rules was necessarily exempt "because

only unlawful and not lawful conduct should be enjoined." 112 NLRB, at 315.

Contrary to the court below (A-9, *infra*), the **Moore Dry Dock** tests were not evidentiary of the union's motive in picketing the primary employer but of the category, primary or secondary, into which the picketing fell. They concretized the requirement that a picket line at a common situs attack only the primary employer by establishing objective standards for compliance with it. The union's right to bring pressure to bear against the primary employer by picketing him within the framework of the **Moore Dry Dock** rules was as absolute as the right of neutral employers to be free from pressure generated by picketing outside those bounds.[6] Consequently, the tests

[6] To the extent that the Union observed *Moore Dry Dock* rules in its picketing, any resulting work stoppage by employees of neutral employers was regarded as volunteered, not as the product of unlawful inducement. *Baltimore Building & Construction Trades Council (Piezonki d/b/a Stover Steel Service)*, 108 NLRB 1575, 1577, reversed only on the ground that by failing to identify the primary employers on the picket signs, as the fourth *Moore Dry Dock* rule requires (cf. 108 NLRB, at 1581 with 108 NLRB, at 1577), the union had not made clear that its dispute was with them alone, *sub. nom. Piezonki v. NLRB*, 4 Cir., 219 F. 2d 879, 883; cf. *NLRB v. General Drivers, Etc.*, 5 Cir., 225 F. 2d 205, 210, certiorari denied, 350 U. S. 914. As the court below acknowledged (A-6, *infra*), it was well settled that picketing within the confines of the *Moore Dry Dock* rules "will not run afoul of the statute simply because employees of neutral employers *do* honor the picket line and that this is one of the lawful benefits which may be expected to accrue from such union activities." Thus, "proof of the effect is not proof of the violation * * *." *Schauffler v. Local 30, D. Pel.*, 47 LRRM 2576, 2578, 2580. Accordingly, a union could not be required, without unduly impairing its right to lawful benefits, "to take affirmative action to negative the inducement which the mere existence of [a primary] picket line constituted by ordering the men back to work" (*Baltimore Building and Construction Trades Council, supra*, 108 NLRB at 1576), or to "advise the secondary employees * * * that the picket line is not intended to apply to them". *General Teamsters, Chauffeurs and Helpers, Local No. 249 (Crump, Incorporated)*, 112 NLRB 311, 312, note 1. A union could be required to issue such instructions, only if, because of specific union by-laws, rules or instructions, the picketing, although ostensibly directed against the primary employer, was actually a prearranged "signal" to employees of neutrals to strike. Cf. *NLRB v.*

could not be disregarded merely because there was "more direct evidence of the intent and purposes of the labor organization."

No threat to the legality of future picketing directed against primary employers was involved in the orders approved in **Denver** and **Langer**. As this Court took pains to point out (341 U. S., at 687-688, 699-700), the violations there found were based upon picketing directed entirely against neutral employers. The picket signs did not publicize the unions' disputes with the primary employers at all, and the unions did not even treat the primary employers as their adversaries. Thus, this Court described the order in **Langer** (341 U. S. at 700-701) as enjoining "peaceful picketing conducted * * * **merely** as an inducement or encouragement of employees to engage in a secondary boycott" [Emphasis supplied]. It contrasted such picketing for "an unlawful object" (341 U. S., at 704), with picketing "in furtherance of a lawful object". The epitome of picketing for a lawful object is "picketing * * * of the employer primarily involved in the controversy." **United Brotherhood of Carpenters, Etc. v. Sperry**, 10 Cir., 170 F. 2d 863, 868, cited in **Langer**, 341 U. S., at 705, note 9.[7] Such picketing, protected by Sections 7 and 13, was held additionally immunized from injunctive restraint by the protection afforded to non-coercive speech in Section 8 (c). 341 U. S., at 704-705.

As this case demonstrates, the Board's new approach to common situs picketing makes preservation of the

*Denver Bldg. Council*, 341 U. S. 675, 678-679, 690-691, with *International Brotherhood of Electrical Workers (Langer) v. NLRB*, 341 U. S. 695, 700. There is no suggestion that any such by-laws, rules or instructions were outstanding or operative in this case.

[7] Senator Taft contrasted "strikes in the nature of secondary boycotts," which he characterized as being for "wholly illegal and improper purposes," with strikes against the primary employer, which, excepting only jurisdictional strikes prohibited by Section 8 (b) (4) (D), he described as being "for justifiable purposes." 93 Cong. Rec. 3835, 2 Leg. Hist. LMRA, pp. 1005-1006.

union's right to picket the primary employer contingent upon its having refrained from any secondary action, on the picket line or elsewhere. Thus, picketing of the primary employer in complete conformity with the **Moore Dry Dock** rules, conduct admittedly lawful, becomes "unlawful", and is thereafter barred, if the Board infers that "the totality of the union's effort is intended to accomplish a proscribed objective by inducement of secondary employees". **Chauffeurs, Teamsters and Helpers Local Union No. 175 (McJunkin Corporation)**, 128 NLRB No. 57, 46 LRRM 1340, 1342-1343; **United Wholesale and Warehouse Employees Local 261 (Perfection Mattress and Spring Co.)**, 129 NLRB No. 125, 47 LRRM 1121; see **Milwaukee Plywood Corp. v. NLRB**, 7 Cir., decided December 20, 1960, 47 LRRM 2291, 2293. Under the new approach, adopted here by the court below, exertion of primary pressure remains permissible only "so long as [the union] played the game fair and 'according to the book'." **McJunkin** case, *supra*, fn. 5, quoting and relying upon **Carpenters' Union, Local 131 v. Cisco Construction**, 9 Cir., 266 F. 2d 365, 369, certiorari denied 361 U. S. 828. Nothing could more plainly demonstrate the incompatibility of this approach with effectuation of "the dual congressional objectives" than the admission of the court below that it is unnecessary to "determine the area of union's rights, as against Simpson, the primary employer * * *". (A-12, *infra*.)

Extinguishment of an offending union's right to exert pressure on the primary employer is in clear conflict with **System Federation No. 91, etc. v. Wright**, 364 U. S. 642, 648-649; cf. **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, 139-140. To paraphrase the **Wright** case, at page 648, the Board is not authorized to deny to unions which have offended the secondary boycott ban the privilege of picketing the primary employer, even though such a prohibition might effectuate the policy of the Act against secondary boycotts

(Cf. **Consolidated Edison Co. v. NLRB**, 305 U. S. 197, 235-236). Codifying existing law, "Congress has, by the proviso to Section 8 (b) (4) (B), specifically protected common situs picketing directed solely at the primary employer • • • even though employees of other employers refused to cross the picket line." **Schauffler v. Slate, Tile and Composition Roofers, Local 30**, D. Del., Feb. 10, 1961, 47 LRRM 2576, 2578 and note 5. Thus, the new proviso reinforces Sections 7 and 13 in establishing that it has been "legislatively determined" that the danger of secondary boycotts which may inhere in allowing such picketing is "an expense more than offset by the benefits" of allowing all unions, whether disposed to violate the Act or not, to engage in it, **Wright** case, *supra*, at p. 649. Denial of this right to violators would "render protection in no way authorized by the needs of safeguarding statutory rights, at the expense of a privilege denied and deniable to no other union," *Ibid.*, at p. 648. Denial, moreover, is in square conflict with the Second Circuit's holding in **McLeod v. Chefs, Cooks, etc.**, 280 F. 2d 760, 764, 765, that unlawful conduct "should not conclude the unions from engaging in lawful activity at a later time," and that to conform to the Act's policies an injunction must be "framed so as to curtail only that which [would run] afoul of the act."

The Board's theory, rejected below, that total prohibition of picketing is warranted because after Simpson arranged for removal from the project of those employees over whom the Union claimed jurisdiction the Union was no longer entitled, under the **Moore Dry Dock** rules, to picket him there,* as the court below acknowledged, is in

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* As demonstrated in the Brief for Petitioner in No. 321, this Term, pp. 76-89, that theory is predicated on the fallacy that the only legitimate object of primary picketing is to appeal to those employees and prospective employees of the primary employer who are directly involved in the labor dispute.

square conflict with decisions of the Fifth Circuit, the District of Columbia Circuit and the Eighth Circuit.[9] If urged here in defense of the Board's order, the contention magnifies rather than diminishes the need for review by this Court.

If, on the other hand, it should be argued that as construed by the court below the decree does not enjoin all picketing but only picketing which is unlawfully motivated, its entry conflicts with **McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, etc.**, 2 Cir., Feb. 8, 1961, 47 LRRM 2541, 2542, holding that "an injunction in the words of the statute [prohibiting picketing for "an unlawful objective"] would be so lacking in precise warning that the unions could never picket at all with any degree of safety, while on the other hand a court could not make adjudications in contempt with any assurance of fairness or accuracy." Specificity in decrees, which "is basic to correct judicial administration" (**Cunningham v. English**, D. C. Cir., 269 F. 2d 517, 524, certiorari denied 361 U. S. 897), becomes "all the more essential when vagueness might induce individuals to forego their rights * * *." **Scull v. Virginia**, 359 U. S. 344, 353. In view of the findings that the picketing of Simpson violated Section 8 (b) (4) (i) (B), "[w]e must require explicit language making it clear that the mere [picketing of Simpson in accordance with the **Moore Dry Dock** rules] will not subject [petitioner] to punishment for contempt." **NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 233.

Finally, whether or not Congress intended to sanction under Section 8 (b) (2) picketing aimed at forcing an em-

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[9] *National Labor Relations Bd. v. General Drivers, Etc.*, 5 Cir., 225 F. 2d 205, 209-210, certiorari denied 350 U. S. 914; *Seafarers International Union, Etc. v. NLRB*, D. C. Cir., 265 F. 2d 585, 590 and *Local 618, Etc. v. National Labor Relations Bd.*, 8 Cir., 249 F. 2d 332, 337. The court below held these cases inapposite entirely because it regarded petitioner's conduct away from the picket line as revealing that it had an unlawful intent.

ployer to enter into a pre-hire contract legalized by Section 8 (f), it is clear that picketing against the primary employer for that object cannot be outlawed by a decree issued under Section 8 (b) (4). **NLRB v. International Rice Milling Co., Inc.**, 341 U. S. 665; **Garner v. Teamsters Union**, 346 U. S. 485, 487, 488-489; cf. **Labor Board v. Drivers Local Union No. 639**, 362 U. S. 274. Consequently, the encroachment upon primary picketing effected by this decree is indistinguishable from the encroachment effected by any order which prohibits picketing of the primary employer at a common situs pursuant to any dispute over wages, hours or working conditions.

2. The holding that the statements by which petitioner sought to induce Gilmore to persuade Simpson to sign the union contract or remove Simpson from the project violated Section 8 (b) (4) (ii) (B) confirms the fears of Congressional opponents that the Section would be construed to outlaw not only threats, restraint and coercion, but all union efforts to persuade neutral employers to cease doing business with the union's adversary. 2 Leg. Hist. LMRDA,[10] pp. 1037, 1426, 1493 (1).

Representative Griffin's analysis (2 Leg. Hist. LMRDA, 1523 (1)), on which the Board relied (A-26, note 6, *infra*), itself shows that Section 8 (b) (4) (ii) (B) was designed to do no more than reverse the rule that a union could lawfully induce a neutral employer to boycott the primary employer by threatening to take illegal action against him, *i. e.*, to call or induce a strike or work stoppage among the neutral employer's employees.[11] "Congress had no intention [in

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[10] The citation "Leg. Hist. LMRDA" refers to the two-volume Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Gov't Print. Off., 1959), compiled by the NLRB.

[11] See also, 2 Leg. Hist. LMRDA, 1194 (2-3), and 1581.

Section 8 (b) (4) (ii) (B)] of preventing a union or its representatives from addressing non-coercive pleas to [neutral] employers." **Alpert v. Excavating, Etc. Union No. 379**, D. Mass., 184 F. Supp. 558, 561.[12] Congress enacted the same distinction between "coercion" and "persuasion" which the Board had made in applying the prohibition of Section 8 (a) (1) against employer "restraint and coercion" of employees. Under it, announcement of an intention to do that which one can legally do is "persuasion"; announcement of an intention to do that which one cannot legally do is "coercion."[13] The distinction is a basic and familiar one.[14]

To read the Act as condemning communication of a union's willingness to cease picketing at a common situs if and when the primary employer is removed (A-26, note 6, A-12-13, *infra*) is to misread it. That "is evidence of a desire to comply with, not to violate the law." **Schauffler v. United Slate, Tile and Composition Roofers, Local 30**, 47 LRRM 2576, 2580-2581. It is not illegal "under any possible interpretation of the statute." *Ibid.*, at p. 2580.

The approach of the Board and the court below would prohibit a union, about to go on strike, from advising the primary employer's customers of its intention to strike and picket the primary employer's plant. It would prevent

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[12] 2 Leg. Hist. LMRDA 1750 (1), 1823 (2), 1841 (3), 1104 (2-3), 1523 (1).

[13] NLRB, *Nineteenth Annual Report* (Gov't Print. Off., 1954), p. 64; NLRB, *Twenty-fourth Annual Report* (Gov't Print. Off. 1959), p. 54; *Esquire, Inc.*, 107 NLRB 1238, 1239; *Aeronca Mfg. Corp.*, 121 NLRB 777, 779; *Universal Producing Co.*, 123 NLRB 548, 550.

[14] See *Empire Theater v. Cloke*, 53 Mont. 183, 16 Pac. 107: "In short, the 'threat' conveyed was to do what the defendants lawfully could do—a mere warning of their intention, which they could lawfully give. (Cooke on *Combinations, Monopolies and Labor Unions*, secs. 77 et cit.)."

a union, on strike against a manufacturer, from advising his retail distributors of its intention to conduct a consumer boycott of the product by newspaper advertising. Yet Congress did not prevent neutral employers from attempting to avoid the adverse repercussions on themselves of lawful strike action directed against the primary employer by urging him to yield to the union's demand[15] or by ceasing to do business with the primary employer. Since Congress left neutral employers free to take such action, it cannot have intended to prevent unions from seeking to persuade neutral employers to do so by informing them of their plans or intention to take or to continue lawful strike action against the primary employer. To prohibit such communications is to infringe the freedom of speech guaranteed by Section 8 (c) and the First Amendment, see pp. 13-14, *supra*; **Alpert v. Excavating, Etc. Union No. 379**, 184 F. 2d, at 561.

To the extent that the picketing which petitioner advised Gilmore would continue was directed against Simpson, not Gilmore, in conformity with the **Moore Dry Dock** standards, what the Union was "threatening" was lawful, not unlawful, action. This Court should make it clear that the Union "had the right to do [that, and, consequently] had the right to say that [it] would." **Esquire, Inc.**, 107 NLRB 1238, 1239; cf. **Dartmouth Finishing Corp.**, 120 NLRB 262, 264.

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[15] In Section 8 (e), the clause outlawing so-called "hot cargo" contracts, Congress made it unlawful for an employer only to enter into "a contract or agreement" with a union for cessation of business; the section does not prohibit cessation which occurs at the instance of a union but not pursuant to any agreement with it. See 2 Leg. Hist. LMDRA 1750 (1), 1823 (2), and note 12, *supra*. If construed to outlaw such cessation, Section 8 (e) would have the effect of outlawing the very persuasion which Section 8 (b) (4) (ii) (B) preserves. See 2 Leg. Hist. LMDRA 1428 (1), 1707-1708.

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: March, 1961.

## APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 16,538.

National Labor Relations Board, Petitioner,

vs.

International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, Respondent.

Petition to Enforce Order of National Labor Relations Board.

[December 22, 1960.]

Before Woodrough, Van Oosterhout, and Matthes, Circuit Judges.

Matthes, Circuit Judge.

This is what is commonly referred to as a secondary boycott case. Gilmore Construction Company was the general contractor for the construction of a new building at South High School, Omaha, Nebraska. Simpson Company was a subcontractor for Gilmore at the project. Upon complaint of Gilmore, the Board filed charges against respondent, herein called "Union," charging that

in furtherance of a labor dispute with Simpson, Union had engaged in unfair labor practices within the meaning of § 8 (b) (4) (i) and (ii) (B) of the Labor Management Relations Act, 1947, as amended by the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. A. § 158 (b) (4) (i) (ii) (B), hereinafter referred to as "Act." The same activities of the Union also caused the Board to petition the United States District Court for the District of Nebraska for an injunction (which was granted) and upon stipulation, the parties hereto waived a hearing before a Trial Examiner, and submitted this case to the Board upon certain documents and the transcript of the proceeding in the injunction action, **Hugh E. Sperry, Regional Director v. International Hod Carriers, etc., Local 1140.** The case is now before us on petition of the Board for enforcement of its order against Union, the Board having found that Union had violated the aforementioned section of the Act.

There is no controversy as to the facts, which disclose that on November 20, 1959, Gilmore had eight subcontractors working on the school building, and among them was Simpson. On that day Simpson hired several non-union "day laborers" through the Nebraska Unemployment Bureau, for work on what was otherwise an all-union project. Union's business agent Otte appeared on the job at about 2:00 P. M. and instructed the non-union laborers to stop work. At the same time he told Joe Tripp, one of Gilmore's laborers, and a member of Union, to discontinue working and Tripp complied. When Simpson's foreman inquired of Otte, "What do we have to do to keep from having a picket put on the job?", he was told to "(m)eet wages and conditions." When the foreman indicated he was willing to pay the men wages based on Union's scale, Otte informed him further "(y)ou will have to pay them all for eight hours, and the company will have to sign a contract with the Union." On the

same afternoon, November 20, Union picketed the job with a sign carrying the legend:

Simpson Co.
Refuses to Pay
Union Wages
& Conditions
Laborers Local 1140
This Dispute With Above
Employer Only

On the following day, Saturday, November 21, Otte telephoned Mr. Van Scoy, secretary of Gilmore, and advised him the project would be picketed the following Monday unless the non-union laborers were paid union scale for their work the previous day and Simpson signed a union contract. On the same day, when the owner of Simpson received similar advice from Otte, he agreed to comply with the wage demand but refused to sign a contract.

On Monday, November 23, picketing by Otte brought the project to a standstill as none of the employees of any employer would cross the picket line. On that day, Van Scoy advised Otte that there would be no more non-union laborers on the job, that Gilmore would furnish laborers for all unloading work which Simpson might require, and he requested Otte to discontinue picketing, but Otte refused. When Van Scoy asked Otte, "What do we have to do?" Otte replied, "You will have to get the AGC contractors to blacklist Simpson and not allow him on any of your jobs."[1] Van Scoy further testified that on this occasion Otte stated: "If Kiewit or any other contractor in Omaha had Simpson on his job and he had non-Union laborers [we] would picket the job just the same as

[1] Van Scoy was president of Associated General Contractors of Nebraska and president of the Omaha Employers Association of AGC.

[yours]."[2] It also appears without dispute that on the following Friday, November 27, George Gilmore discussed the situation with Leonard Schaeffer, assistant business agent of Union. Apparently Schaeffer was complaining because the injunction proceeding had been instituted, and when Gilmore indicated that such action was necessary to get the pickets off the job, Schaeffer stated: "Well, you can run Simpson Company off the job."

Pickets remained on the job site daily from November 20 to December 4, 1959, when they were removed pursuant to the temporary restraining order issued by the United States District Court for the District of Nebraska.

Upon these facts, the Board found [1] that Union had "induced and encouraged" secondary employees to cease work within the meaning of § 8 (b) (4) (i) (B); [2] that there was "coercion and restraint" of a secondary employer within the meaning of § 8 (b) (4) (ii) (B); [3] that Union's picketing had the unlawful "secondary boycott" objective of forcing Gilmore to cease doing business with Simpson; [4] that, inasmuch as Union was not certified as the bargaining representative of Simpson's employees, the picketing had the unlawful "recognition" objective proscribed by the Act.

Broadly stated, the question is whether the challenged activities of Union fall within the practices proscribed by § 8 (b) (4) (i) and (ii) (B) of the Act. Insofar as pertinent here, that section provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents——

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[2] See *N. L. R. B. v. International Hod Carriers, etc.*, No. 16,511, ... F. 2d ..., opinion filed December ....., 1960, in which Union concededly engaged in unlawful conduct proscribed by § 8 (b) (4) (A) and (B) of The Labor Management Relations Act of 1947. There, Peter Kiewit Sons' Company was the secondary employer

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal . . . to perform any services; or

"(ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is——

. . . . . .

"(B) forcing or requiring any person to . . . cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of § 9. . . . **Provided**, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[3]

The narrow question is—what was the **real** purpose of the challenged conduct? Union contends that the picketing was primary, aimed solely at Simpson, and that viewing the record as a whole, there is no substantial evidence to support the Board's findings. To implement this assertion, the argument is advanced that Union was engaged in a primary labor dispute with Simpson, which in essence

[3] By the 1959 amendments, the scope of the prohibition against conduct aimed at achieving unlawful objectives proscribed by the Act, has been broadened. Under § 8 (b) (4) of the 1947 Act, the inducement of "employees" to engage in a "concerted refusal" to perform services was prohibited, whereas under § 8 (b) (4) (i) of the 1959 Act, inducing or encouraging an *individual* employee to refuse to work, is also proscribed. Additionally, we observe that whereas the 1947 Act aimed at prohibiting secondary boycotts by outlawing inducement of employees of a neutral employer to cease work, the 1959 amendment, § 8 (b) (4) (ii), broadens the scope of the prohibition by making it unlawful to "threaten, coerce, or restrain *any person* engaged in commerce" (Emphasis supplied).

involved Simpson's method of employing casual laborers. In the words of Union's brief: "The Union demanded that Simpson sign a contract binding itself, inter alia, to hire such laborers, when it needed them, through the Union hiring hall; Simpson refused. The Union picketed to induce Simpson to yield."

While it has long been recognized that picketing, otherwise lawful, will not run afoul of the statute simply because employees of neutral employers **do** honor the picket line, and that this is one of the lawful benefits which may be expected to accrue from such union activities, nevertheless, § 8 (b) (4) (i) (ii) (B) specifically sets out the legal limits of such picketing, i. e., the union may not "induce, coerce or restrain" neutral employees or employers with the unlawful object of effecting secondary boycotts.

The issue we have for determination is less complicated in instances in which the picketing is directed against the primary situs of the dispute, but becomes more difficult of resolution when a common situs is involved. Concededly, this is a "common situs" case, i. e., one where a neutral employer is engaged along with the primary employer, in different activities on the same premises. **Labor Board v. Denver Bldg. Council,** 341 U. S. 675, presented such a situation. The Supreme Court sustained the Board in its finding that the strike had a proscribed object and came within the ambit of § 8 (b) (4) (A), the predecessor to § 8 (b) (4) (i) and (ii) (B), stating at p. 692:

> "In the views of the Board as applied to this case we find conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

To resolve the numerous problems which stem from common situs activities, and in order to protect the Union's right to carry on its lawful activities against the primary employer, as well as to adequately protect the neutral employers and employees, strangers to the dispute, certain evidentiary standards were evolved for distinguishing between primary and secondary picketing at a common situs. These may be stated as the "Moore Dry Dock tests," **Sailors' Union of the Pacific, AFL and Moore Dry Dock Company**, 92 NLRB 547. Under the situation presented in that case, the Board ruled that picketing the premises of a secondary employer is primary if it meets the following conditions:

> "a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* c) the picketing is limited to places reasonably close to the location of the *situs;* and d) the picketing discloses clearly that the dispute is with the primary employer."

The Union argues that all of these tests were met in this instance—*ergo*, the picketing was lawful.

There is much discussion by the parties as to the second test, i. e., whether Simpson was engaged in its normal business at the construction site; the Board urges that it was not—that no employees within the Union's jurisdiction were at work upon the project after the first day of picketing, and that picketing could have no meaningful appeal to other employees of Simpson. On the other hand, the Union urges that Simpson was very much "on the job"; that its materials and other workmen remained upon the project, that the dispute was a continuing one, and that Simpson would be free to hire other casual laborers at

any time. Union rests its position on our holding in **Local 618, Etc. v. National Labor Relations Bd.**, 8 Cir., 249 F. 2d 332, and the cases of **Seafarers International Union, Etc. v. N. L. R. B.**, D. C. Cir., 265 F. 2d 585, and **National Labor Relations Bd. v. General Drivers, Etc.**, 5 Cir., 225 F. 2d 205, cert. denied 350 U. S. 914. **Local 618**, supra, while not entirely inapposite, has features which render it clearly distinguishable. There, the picketing was carried on at the premises of the primary employer, so that a "primary" rather than a "common" situs situation existed and this feature caused the court to make this observation, at p. 336:

> "We emphasize that in our present case the strike was at the business situs of the struck employer. The legality of the strike and picketing at all stations prior to August 8, 1955, is conceded, and the legality of the strike and picketing at the stations other than Manchester subsequent to August 8, 1955, is not questioned."

In **Local 618**, we held that the temporary cessation of picketing of the primary employer's premises did not change the character of the picketing when resumed, so that it could properly be said that it was for an illegal purpose. In other words, the previous legal activity was not transformed into unlawful conduct because the primary employees were temporarily removed from the premises. It may well be that under proper circumstances temporary removal of primary employees from premises occupied by secondary employers and employees will not transform a picket line from a legal one to an illegal one, but we are satisfied that on this record that rule has no application. The facts in **Seafarers International Union**, supra, and **General Drivers, Etc.**, supra, are likewise distinguishable. In those cases, it appears there was a total absence of proof of unlawful encouragement, coercion.

etc., of secondary employees, and further, that the labor organizations there involved took affirmative action to make it clear that their picketing was directed solely at the primary employer.

Apart from the fact that the above cases are factually dissimilar, it is our view that Union assumes too much by proceeding upon the theory that the Moore Dry Dock tests are the single guide for our decision. It must be remembered that these tests were set up for the purpose of determining the character of the picketing, that they are evidentiary in nature, and they are to be employed in the absence of more direct evidence of the intent and purposes of the labor organization. This conclusion is implicit in the cases relied upon by Union, which have accorded wide approval of the Moore Dry Dock tests, **National Labor Relations Bd. v. Associated Musicians**, 2 Cir., 226 F. 2d 900, 906, cert. denied 351 U. S. 962; **Piezonki v. National Labor Relations Board**, 4 Cir., 219 F. 2d 879, 881; **National Labor Relations Bd. v. General Drivers, Etc.**, supra, 225 F. 2d at p. 209; **National Labor Rel. Bd. v. Chauffeurs, Teamsters, Etc.**, 7 Cir., 212 F. 2d 216, 219; **National Labor Relations Board v. Local Union No. 55**, 10 Cir., 218 F. 2d 226, 231; **Seafarers International Union, Etc., v. N. L. R. B.**, supra, 265 F. 2d at pp. 591-592; and indeed in the **Moore Dry Dock** case itself, 92 NLRB at pp. 550-551.

In the case before us, there was ample direct, and uncontradicted evidence pointing to the intent of Union, and we believe the Board could have arrived at no other conclusion than that the activities here were intended to "induce and encourage" secondary employees to cease work; to "coerce and restrain" Gilmore; to force Gilmore to cease doing business with Simpson; and to bring about the unlawful "recognition" objective proscribed by the Act, § 8 (b) (4) (i) (ii) (B).

In the alternative, Union asserts that it had the right to picket Gilmore as a primary employer under the "ally doctrine," see **National Lab. Rel. Bd. v. Business Mach. & Office A., Etc.**, 2 Cir., 228 F. 2d 553, cert. denied 351 U. S. 962. This point is based upon Gilmore's offer to supply its own laborers whenever needed by Simpson for the purposes of unloading trucks, etc.

This contention was not advanced before the Board, and the Union has raised the issue for the first time on this appeal. Section 10 (e) of the Act, 29 U. S. C. A., § 160 (e), provides that, absent extraordinary circumstances, "No objection that has not been urged before the Board • • • shall be considered by the court," and the failure to raise such issue precludes Union from raising it here. See **Labor Board v. Cheney Lumber Co.**, 327 U. S. 385, 388-389; **Marshall Field & Co. v. Board**, 318 U. S. 253, 255; **National Labor Relations Bd. v. Associated Musicians**, supra, 226 F. 2d at p. 907.

The Union also attempts to attack the Board's conclusions as to the weight and portent of the undisputed evidence, asserting as one point, that there was no evidence that Union knew that Tripp was an employee of Gilmore, and that the Board failed to specifically find that Union induced an **employee**, i. e., Tripp to cease work. Obviously, this is a grasping for straws. The Board's findings were:

> "In view of Otte's instruction to secondary employee Tripp to stop working on the very first day of the picketing, and the fact that the picketing continued after the primary Simpson employees were no longer on the job and Respondent had been told by Gilmore that they would not be used on the job again, we find that the Respondent 'induced and encouraged' secondary employees to cease work within the meaning of Section 8 (b) (4) (i) (B)."

While there is no direct evidence to establish that Otte knew that Tripp was a Gilmore employee, it is undisputed that Tripp was a member of Union, and since Union's grievance with Simpson sprang from the latter's failure to employ union laborers, the logical deduction is that Otte knew that Tripp was not employed by Simpson. At the time of the incident Tripp was assisting another Gilmore employee in unloading a truck. The aggregate of these circumstances would cause any prudent person to at least make further inquiry before pursuing the rather drastic course followed by Otte.

In any event, in view of the evidence heretofore discussed, it seems clear beyond question that secondary employees were induced to cease work, within the meaning of the Act, and Tripp's employment status, as such, is immaterial.

Union also attempts to demonstrate the legality of its objectives by citing us to § 8 (f) of the 1959 amendments, which in summary provides that it shall not be an unfair labor practice under subsections (a) and (b) of § 8 for a labor organization and an employer engaged primarily in the building and construction industry, to enter into a hiring-hall agreement. Although Congress has given validity to such an agreement, voluntarily entered into by the parties, we find no congressional approval of the use of strikes or picketing to compel execution of a prehire agreement. Indeed, the legislative history indicates the contrary to be true. The Conference report which deals with the subject, states: "The conference adopted the provision of the Senate bill permitting prehire agreements in the building and construction industry. Nothing in such provision is intended to restrict the applicability of the hiring hall provisions enunciated in the Mountain Pacific case (119 N. L. R. B. 883, 893) or to authorize the use of force, coercion, strikes, or picketing to compel

**any person to enter into such prehire agreements.**" (Emphasis supplied). See U. S. Code Congressional and Administrative News, 86th Cong. 1st Sess. (Special Pamphlet), No. 14, Sept. 16, 1959, at p. 3186. **Labor Board v. Drivers Local Union No. 639**, 362 U. S. 274, relied on by Union, is inapposite. There the question was whether peaceful picketing by a union, which did not represent a majority of the employees, constitutes restraint or coercion of **employees** in the exercise of their rights guaranteed by § 7, thus being an unfair labor practice under § 8 (b) (1) (A) of the Act of 1947.

Inasmuch as the evidence here fully supports the finding that Union was engaged in secondary boycott activities, in violation of the Act, we need not determine the area of Union's rights, as against Simpson, the primary employer, since § 8 (b) (4) (i) (ii), specifically outlaws secondary picketing when its purpose is to force the employer to bargain with the union as the representative of his employees, unless the union has been certified by the Board. It was stipulated here that Union was not so certified.[4]

Union also asserts that the comments made to Gilmore did not constitute threats or coercion, but were merely privileged statements of a lawful position. There is no merit in this contention. "Requests and threats addressed . . . to employers, even though not illegal in themselves . . . may be considered in determining the motives for picketing." **National Labor Relations Bd. v. Associated Musicians**, supra, 226 F. 2d at p. 904. In determining whether the picketing here involved was for un-

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[4] § 8 (b) (7), added by the 1959 amendment, provides new limitations upon picketing for the object of forcing or requiring an employer to recognize or bargain with a labor organization unless such labor organization is certified as the representative of the employees involved. For discussion of "organizational" and "recognitional" picketing, see *Labor Board v. Drivers Local Union*, supra, 362 U. S. at pp. 282-292.

lawful purposes proscribed by the Act, it need only be said that the comments and statements of Union agents speak for themselves.

The order entered by the Board directs Union to cease and desist from:

> "Engaging in or inducing • • • employees of Gilmore Construction Company, **or any other employer**, to engage in strikes or refusals in the course of their employment • • • to perform any services, or to threaten, coerce, or restrain Gilmore Construction Company, **or any other employer** • • • where an object thereof is to force or require Gilmore Construction Company, **or any other employer** or person, to cease doing business with Simpson Company (or any other employer), or an object thereof is to force or require Simpson Company, (or any other employer), to recognize or bargain with the Respondent, in the absence of a certification as bargaining representative of the employees of such employer." (Emphasis and parentheses supplied.)

Union contends that the Board's order is too broad in two respects: (1) it fails to provide that Union shall have the right to engage in primary strikes and primary picketing against Simpson, and (2) it encompasses not only Gilmore and his subcontractors on the school project in Omaha, Nebraska, but other employers.

In amending § 158 (b) (4) of the Act, Congress made it clear that it was not attempting to prevent lawful primary picketing or primary striking. See proviso to § 158 (b) (4) (ii) (B) of the 1959 amendment. However, we cannot agree that, unless the language of the proviso is incorporated in the order, Union's rights, as clearly safeguarded by the statute, will in any way be impaired. By explicit terms, the order is designed to prohibit only that conduct

which is proscribed by the statute, that is, picketing or striking for an unlawful purpose. We cannot perceive of anyone suggesting that the order can rationally be construed to prohibit lawful primary picketing or lawful primary striking.

While there is more substance to Union's second objection, it cannot be sustained in its entirety. In case No. 16,511, opinion filed this day, .... F. 2d ...., another action against Union, the sole question presented involved the validity of the broad order. There, unlike the instant situation, the Board did not find that Union had pursued other unlawful practices, neither was there any evidence of a clear purpose to violate the Act or an intention to do so in the future.[5] Here we have probative evidence indicating that Union has engaged in prior illegal conduct of the same or similar type forming the basis for the instant charge. Indeed, in No. 16,511, supra, Union in effect conceded on appeal that its picketing of the project was for an unlawful purpose proscribed by § 8 (b) (4) (A) and (B) of the Act and that an appropriate order should be entered. It is not without significance that the instant unfair labor conduct had its inception approximately 7 months after the incident in No. 16,511, supra, (April 27, 1959) and that in both instances the same pattern of action was pursued by Union. We are also mindful that in **International Brotherhood of Teamsters, Etc.**, 116 N. L. R. B. 461, Union was found to have engaged in unlawful picketing and secondary activities directed against numerous contractors in connection with its primary dispute with the Ready Mixed Cement Company.

Thus we have not only prior violations but, as we have seen, threats of future transgressions which are sufficient

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[5] See *Communications Workers v. N. L. R. B.*, 362 U. S. 479; *Labor Board v. Express Pub. Co.*, 312 U. S. 426, 433; *May Stores Co. v. Labor Board*, 326 U. S. 376, pp. 388-392.

to demonstrate to us a proclivity for unlawful conduct requiring the imposition of an order which will prohibit Union from exerting pressure not only upon Gilmore but upon other neutral employers for purposes declared unlawful by § 8 (b) (4) (i) and (ii) (B). **Electrical Workers v. Labor Board**, 341 U. S. 694, at pp. 705, 706; **Labor Board v. Express Pub. Co.**, supra, 312 U. S. 426. However, upon the record before us, we observe that the threats of future unlawful activities were directed and confined solely to Union's grievance with Simpson Company; therefore, that portion of the order included in parentheses, "or any other employer" following the words "Simpson Company" being without factual support, should be stricken. Compare **N. L. R. B. v. United Brotherhood of Carpenters, Etc.**, 7 Cir., 276 F. 2d 694; **N. L. R. B. v. Bangor Building Trades Council, AFL-CIO**, 1 Cir., 278 F. 2d 287, 291.

The order is modified by striking the words "or any other employer" appearing in parentheses in the order above quoted, and following the words "Simpson Company," and as so modified the order will be enforced.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

## APPENDIX B.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1960.

National Labor Relations Board,
Petitioner,
v.
International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO,
Respondent.
No. 16,538.

**Decree Enforcing, as Modified, an Order of the National Labor Relations Board.**

Before: Woodrough, Van Oosterhout, and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against Respondent International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, its officers, representatives, agents, successors, and assigns on May 4, 1960. The Court heard argument of respective counsel on November 15, 1960, and has considered the briefs and transcript of record filed in this cause. On December 22, 1960, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order as modified. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the respondent International Hod Carriers, Building and Common Labor-

ers' Union of America, Local No. 1140, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in or inducing or encouraging employees of Gilmore Construction Company, or any other employer, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or to threaten, coerce, or restrain Gilmore Construction Company, or any other employer engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Gilmore Construction Company, or any other employer or person, to cease doing business with Simpson Company, or an object thereof is to force or require Simpson Company, to recognize or bargain with the Respondent in the absence of a certification as bargaining representative of the employees of such employer.

2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act.

(a) Post in conspicuous places in the Respondent's business offices, meeting halls and all places where notices to members are customarily posted, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region (Kansas City, Missouri), shall, after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material;

(b) Sign and mail sufficient copies of said notice to the aforesaid Regional Director for posting, Gilmore Construction Company and Simpson Company willing, at all locations where notices to their respective employees are customarily posted;

(c) Notify the Regional Director in writing within ten (10) days from the date of this Decree what steps the Respondent has taken to comply herewith.

Dated: January 19, 1961.

## APPENDIX.

### NOTICE

To All Members of International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, and to All Employees of Gilmore Construction Company and Simpson Company

Pursuant to

A Decree of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not induce or encourage employees of Gilmore Construction Company, or any other employer, to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threaten, coerce, or restrain Gilmore Construction Company, or any other employer engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Gilmore Construction Company, or any other employer, to cease

doing business with Simpson Company, or forcing or requiring Simpson Company, to recognize or bargain with us in the absence of a certification as the bargaining representative of the employees of such employer.

International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO

(Labor Organization).

Dated ..... By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

## APPENDIX C.

United States of America
Before the National Labor Relations Board

| | |
|---|---|
| International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO<br>and<br>Gilmore Construction Company. | Case No. 17-CC-111. |

### Decision and Order.

Upon charges filed on November 24, 1959, and December 2, 1959, by Gilmore Construction Company, herein called Gilmore, the General Counsel for the National Labor Relations Board, herein respectively called the General Counsel and the Board, by the Regional Director for the Seventeenth Region, issued a complaint dated December 8, 1959, against International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) and (ii) (B) and Section 2 (6) and (7) of the National Labor Relations Act, herein called the Act. Copies of the charges, complaint and notice of hearing were duly served upon the parties.

With respect to the unfair labor practices, the complaint alleges, in substance, that since on or about November 19, 1959, the Respondent has induced and encouraged employees of Gilmore and its subcontractors to engage in work stoppages, and has coerced and restrained Gilmore and its subcontractors, with the objects of forcing and requiring Gilmore and its subcontractors to cease doing

business with Simpson Company, herein called Simpson, and forcing and requiring Simpson to recognize and bargain with the Respondent even though the Respondent is not the certified bargaining representative of Simpson's employees. On December 21, 1959, the Respondent filed its answer denying that it had engaged in the alleged unfair labor practices.

Thereafter, on January 15, 1960, the parties signed a stipulation in which they agreed that the record herein shall consist of the formal papers and the record in the injunction proceeding in U. S. District Court, District of Nebraska, on December 8, 1959; that the parties waive a hearing before, and the issuance of an Intermediate Report by, a Trial Examiner; and that they desire to submit this case directly to the Board for findings of fact, conclusions of law, and an order, reserving the right to file briefs with the Board.

On January 25, 1960, the Board approved the aforesaid stipulation and made it part of the record herein, and transferred the proceeding to and continued it before the Board for the purpose of making findings of fact, conclusions of law, and the issuance of a Decision and Order. Subsequently, the General Counsel and the Respondent filed briefs.

Upon the basis of the aforesaid stipulation and the entire record in the case, including the briefs filed by the parties, the Board makes the following:

## Findings of Fact.

### I. The Business of the Companies.

Simpson is engaged in the accoustical contracting business in Omaha, Nebraska, and annually receives goods and materials from outside the State of Nebraska valued

at more than $50,000, and also performs services valued at more than $50,000 outside the State.

Gilmore is engaged in the general contracting business in Omaha, Nebraska, and annually receives from outside the State of Nebraska goods and materials valued at more than $50,000.

We find that both Simpson and Gilmore are engaged in commerce within the meaning of the Act.

## II. The Labor Organization Involved.

The complaint alleges, the answer admits, and we find, that the Respondent is a labor organization within the meaning of Section 2 (5) of the Act.

## III. The Unfair Labor Practices.

The essential and uncontroverted facts in this case, as established by the complaint and the answer and the record in the injunction proceeding, are as follows:

Gilmore was on November 20, 1959, the general contractor on a construction project at South High School, Omaha, Nebraska. Gilmore had 8 subcontractors working on the project on that date, one of which was Simpson. Respondent was not on that date, or on any other material date, the certified bargaining representative of Simpson's employees.

On that date, Simpson hired several non-union "day laborers" for work on the project, which was otherwise an all-union project. At about 2 P. M., Respondent Business Agent Otte came on the job and told these non-union laborers to stop work, which they did.[1] Otte also told Joe

[1] One of the Respondent's four defenses is that there is a failure of proof that Otte, and Shaeffer who is discussed below, are agents of the Respondent. However, the president of Gilmore testified without contradiction that Otte and Shaeffer are busi

Tripp, a laborer for Gilmore and a member of Respondent, to stop working, which he did.[3] When the Simpson foreman on the job asked Otte what Simpson could do not to have the job picketed, Otte replied that Simpson would have to "meet wages and conditions" and "sign a contract with the Union." That same afternoon the Respondent picketed the job with a picket sign carrying the following legend:

Simpson Co.
Refuses to Pay
Union Wages
& Conditions
Laborers Local 1140
This Dispute With Above
Employer Only

On the next day, Saturday, November 21, 1959, Van Scoy, secretary of Gilmore, received a phone call from Otte, in which Otte advised Van Scoy that the project would be picketed on the following Monday, unless the non-union laborers were paid union scale for their work on November 20, and Simpson signed a union contract. On that same day, when the owner of Simpson called Otte, Otte told him that there would have to be union men on the job, and that Simpson would have to sign a contract. Simpson agreed to pay the Union scale, but declined to sign a contract.

On Monday, November 23, Otte himself picketed at the job site, and no employees of any employer went to

---

ness agent and assistant business agent, respectively, of the Respondent. Moreover, the conduct of Otte and Shaeffer described herein clearly shows that they were acting as agents of the Respondent.

[3] The Respondent's second defense is that there is a failure of proof that Tripp was an employee of Gilmore. However, Ray Watson, a fellow-employee truck driver for Gilmore, identified Tripp as an employee of Gilmore, and there is no evidence to the contrary.

work. Van Scoy conferred with Otte on the job site, and advised Otte that there would be no more non-union laborers on the job, and that Gilmore would furnish laborers for all laboring work which Simpson might have to do. Van Scoy requested Otte to stop picketing, but the latter refused. Van Scoy asked what had to be done to stop the picketing, and Otte told him that he would have to get the A. G. C. contractors to black-list Simpson and not allow him on any of their jobs.[3] Otte also told Van Scoy that Simpson would have to sign a union contract.

On November 27, the president of Gilmore, in a phone conversation with assistant business agent Shaeffer, asked Shaeffer what he could do to get the pickets off the job. The response was "Well, you can run Simpson Company off the job"; and also that Simpson would have to pay union wages and sign a union contract.

Pickets were on the job site daily from November 29 to December 4, when they were removed pursuant to a temporary restraining order issued by the United States District Court for the District of Nebraska.

## Conclusions.

Section 8 (b) (4) (i) and (ii) (B) of the amended Act provides as follows:

> (b) It shall be an unfair labor practice for a labor organization or its agents
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manu-

[3] Van Scoy is also president of Associated General Contractors of Nebraska and the Omaha Employers Association of A. G. C.

facture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9 Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

In view of Otte's instruction to secondary employee Tripp to stop working on the very first day of the picketing, and the fact that the picketing continued after the primary Simpson employees were no longer on the job and Respondent had been told by Gilmore that they would not be used on the job again,[4] we find that the Respondent "induced and encouraged" secondary employees to cease

[4] See *Moore Dry Dock Company*, 92 NLRB 547, 549, where the Board established as one of the requirements for lawful common situs picketing, that the picketing must be limited to times when the primary employer is engaged in its normal business at the common situs.

work within the meaning of Section 8 (b) (4) (i) (B).[5] Moreover, in view of Otte's and Shaeffer's statements to Gilmore secretary Van Scoy and the president of Gilmore, that the picketing would stop only if Gilmore removed Simpson from the job, we find that there was "coercion and restraint" of a secondary employer by the Respondent within the meaning of Section 8 (b) (4) (ii) (B).[6] These facts also show that the Respondent's picketing had the unlawful "secondary boycott" objective of Section 8 (b) (4) (i) and (ii) (B), i. e., to force Gilmore to cease doing business with Simpson. Finally, in view of Otte's and Shaeffer's statements to the Simpson foreman, the owner of Simpson, Gilmore secretary Van Scoy, and the president of Gilmore, that Simpson would have to sign a Union contract, and thereby "recognize or bargain with" the Respondent, even though the Respondent was not certified, we find that the Respondent's picketing had the unlawful "recognition" objective of Section 8 (b) (4) (i) and (ii) (B).[7]

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[5] This includes, of course, the employees of Gilmore's sub-contractors, as well as the employees of Gilmore.

[6] The legislative history of the 1959 amendments to the Act clearly shows that the purpose of this new section was to outlaw "coercion and restraint" of secondary *employers*, which conduct had been held lawful under the 1947 amendments. See e. g. "Summary analysis of conference agreement as to Title VII, Taft-Hartley amendments," NLRB Legislative History of Labor-Management Reporting and Disclosure Act of 1959, pp. 1454 (Senate), 1712 (House); Representative Griffin's analysis, p. 1523 (1); Joint analysis of Representative Thompson and Senator Kennedy, p. 1707 (2, 3).

Moreover, Representative Griffin's analysis makes clear that a "strike or other economic retaliation," such as the picketing here, constitutes "coercion and restraint" under this new section. Accordingly, there is no merit to the Respondent's contention that the necessary "coercion and restraint" under this new section was not present.

[7] The Respondent's contention, that this objective was not proved in the absence of evidence of a specific offer of a contract or a specific request for recognition, is clearly without merit. A demand for a contract usually implies recognition, and at the very least "bargaining."

In view of the foregoing, we find that the Respondent has violated all parts of Section 8 (b) (4) (i) and (ii) (B), as alleged in the complaint.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following:

## Conclusions of Law.

1. Simpson and Gilmore are employers within the meaning of Section 2 (2) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2 (5) of the Act.

3. By inducing and encouraging employees of Gilmore and other employers to engage in strikes or refusals in the course of their employment to perform services, and by threatening, coercing, or restraining Gilmore, with the objects of forcing or requiring Gilmore and other employers to cease doing business with Simpson, and forcing or requiring Simpson to recognize or bargain with the Respondent in the absence of a certification as the bargaining representative of Simpson's employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8 (b) (4) (i) and (ii) (B) of the Act.

4. The aforesaid unfair labor practices having occurred in connection with the operations of Simpson and Gilmore, as set forth above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and substantially affect commerce within the meaning of Section 2 (6) and (7) of the Act.

## The Remedy.

As we have found that the Respondent has engaged in unfair labor practices in violation of Section 8 (b) (4) (i) and (ii) (B) of the Act, we shall order that it cease

and desist therefrom and take certain affirmative action to remedy the unfair labor practices and otherwise effectuate the policies of the Act. The General Counsel urges, and we agree, that because other employers in addition to Gilmore (Gilmore's subcontractors) were involved in the instant violations, and the Respondent threatened to involve other employers in the future,[8] and also because the Respondent has previously committed similar violations of Section 8 (b) (4) (A) and (B) of the Act prior to the 1959 amendments,[9] a broad order is required to prevent a recurrence of such violations.[10]

## ORDER.

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in or inducing or encouraging employees of Gilmore Construction Company, or any other

---

[8] As indicated, Otte told Van Scoy that the latter, as president of the Nebraska and Omaha A. G. C., would have to get the A. G. C. contractors to black-list Simpson and not allow Simpson on any jobs.

[9] *Int'l Brotherhood of Teamsters, Local No. 659, and Int'l Hod Carriers, etc., Local No. 1140 (Ready Mixed Concrete Company, etc.*, 116 NLRB 461; *Building Material and Construction, etc., No. 659, et al. (Wilson Concrete Company, etc.)*, Case No. 17-CC-57, July 5, 1957, not published in the bound volumes of the Board's Reports; *International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140 (Economy Forms)*, 126 NLRB No. 66.

[10] See *United Association of Journeymen, etc. (United Contractors Council)*, 126 NLRB No. 133.

employer, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or to threaten, coerce, or restrain Gilmore Construction Company, or any other employer engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Gilmore Construction Company, or any other employer or person, to cease doing business with Simpson Company, or any other employer, or an object thereof is to force or require Simpson Company, or any other employer, to recognize or bargain with the Respondent in the absence of a certification as bargaining representative of the employees of such employer.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent's business offices, meeting halls and all places where notices to members are customarily posted, copies of the notice attached hereto and marked Appendix.[11] Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material;

(b) Sign and mail sufficient copies of said notice to the Regional Director for the Seventeenth Region for posting,

---

[11] In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

Gilmore Construction Company and Simpson Company willing, at all locations where notices to their respective employees are customarily posted;

(c) Notify the Regional Director in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., May 4, 1960.

Philip Ray Rodgers, Member
Stephen S. Bean, Member
Joseph Alton Jenkins, Member
John H. Fanning, Member
National Labor Relations Board

(Seal)

## APPENDIX

## NOTICE

To All Members of International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, and to All Employees of Gilmore Construction Company and Simpson Company

Pursuant to

a Decision and Order

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not induce or encourage employees of Gilmore Construction Company, or any other employer, to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any

services, or threaten, coerce, or restrain Gilmore Construction Company, or any other employer engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Gilmore Construction Company, or any other employer, to cease doing business with Simpson Company, or any other employer, or forcing or requiring Simpson Company, or any other employer, to recognize or bargain with us in the absence of a certification as the bargaining representative of the employees of such employer.

International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO.
(Labor Organization)

Dated ..... By .....
(Representative) (Title).

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 7 1961
JAMES R. BROWNING, Clerk

No. 800

# In the Supreme Court of the United States

OCTOBER TERM, 1960

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INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 1210, AFL-CIO, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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ARCHIBALD COX,
*Solicitor General,*
*Department of Justice,*
*Washington 25, D. C.*

STUART ROTHMAN,
*General Counsel,*

DOMINICK L. MANOLI,
*Associate General Counsel,*

NORTON J. COME,
*Assistant General Counsel,*

RICHARD C. SCUPI,
*Attorney,*
*National Labor Relations Board,*
*Washington 25, D. C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

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No. 800

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 1140, AFL-CIO, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. A-1—A-15) is reported at 285 F. 2d 397. The decision of the National Labor Relations Board (Pet. App. C, pp. A-20—A-31; R. 1-11)[1] is reported at 127 NLRB No. 74.

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[1] "R." references are to the printed record in the court below.

## JURISDICTION

The judgment of the court below was entered on December 22, 1960 (see Pet. App. A, p. A-1), and a decree was entered on January 19, 1961 (Pet. App. B, pp. A-16, A-18). The petition for a writ of certiorari was filed on March 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether an order issued by the Board as a remedy for a violation of the secondary boycott provisions of the National Labor Relations Act abridges lawful primary activity when it is phrased merely in the prohibitory language of the section of the Act found to be violated.

2. Whether, in the circumstances of this case, the Board properly found that certain of the union's statements to neutral contractors constituted threats, restraint or coercion outlawed by Section 8(b)(4)(ii)(B) of the Act.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

## STATEMENT

### A. The Board's Findings of Fact

In the fall of 1959, the Gilmore Construction Company (Gilmore) was the general contractor on a con-

struction project at South High School in Omaha, Nebraska (R. 3; 16-17). There were several subcontractors on the project, one of which was the Simpson Company (Simpson), an accoustical and insulation contractor (R. 3; 16-17, 23). On November 20, 1959, when the construction was well under way, Simpson hired five day laborers through the Nebraska Unemployment Bureau to assist its truck driver in moving materials to the job site (R. 3; 19, 24, 31). Though all other workers on the construction project were union members, the Simpson laborers were non-union (R. 3; 22, 24, 27, 32).

During the afternoon of November 20, petitioner Union's business agent, Richard Otte, came to the job site and told Simpson's five laborers to stop work, which they did (R. 3; 19, 22, 23, 26, 28-29). Simpson's foreman on the job, upon learning of Otte's action, told the laborers to observe Otte's demand that they do no further work (R. 17-18, 19, 22). Simpson's foreman then had the five laborers paid off (R. 18, 20). Otte also told Joe Tripp, a laborer for Gilmore and a member of the Union, to stop work, which he did (R. 3; 27-28). Simpson's foreman then asked Otte "What do we have to do to keep from having a picket put on the job?" (R. 3; 21). Otte replied that Simpson would have to "sign a contract with the Union" and meet the Union's "wages and conditions" (R. 3; 21, 22-23).[2] That afternoon, the

[2] At no time material herein has the Union been the certified bargaining representative of Simpson's employees (R. 3).

Union commenced picketing the construction site with picket signs setting forth the Union's grievances against Simpson (R. 3-4; 13, 22, 23, 27-28).

The following morning, Saturday, November 21, Business Agent Otte telephoned M. G. Van Scoy, secretary of Gilmore, and informed him of the pickets at South High School. Otte said that he "wanted to tell * * * [Van Scoy] what * * * [Gilmore] could do to prevent pickets being on there Monday morning" (R. 32; see R. 4). Otte stated that the non-union laborers would have to be paid union scale for their work on November 20, and that Simpson would have to sign the Union's contract and hiring hall agreement (R. 4; 32). Van Scoy later talked to Morris Simpson, owner of Simpson, who in turn called Otte (R. 4; 24-25, 33). Morris Simpson agreed to pay the union scale for work done on the job, but refused to sign a contract (R. 4; 25, 33).

On Monday, November 23, Otte personally picketed at the construction site, and no employees of any employer went to work (R. 4; 21, 33). Van Scoy conferred with Otte at the job site, and advised Otte that arrangements had been made for Gilmore to do any laborers' work that Simpson required in the future, so that "there would be no more non-union laborers on the job" (R. 4; 25-26, 33). Van Scoy then asked Otte if he would stop picketing and was told, "no" (R. 33; see R. 4). Van Scoy asked, "What do we have to do?" (R. 33). Otte answered, "You will have to get the AGC contractors to black-

list Simpson and not allow him on any of your jobs." [3] Van Scoy then said, "You are kind of picking on us, putting us in the middle." Otte replied that he would picket if "any other contractor in Omaha had Simpson on his job." (R. 34.)

Later in the week, while picketing at the construction site continued, the Union's assistant business agent, Leonard Schaeffer, telephoned George Gilmore, president of Gilmore (R. 4; 28-29). During their conversation, George Gilmore asked what means could be used to get the picketing to stop. Schaeffer answered, "Well, you can run Simpson Company off the job" (R. 4-5; 29). Schaeffer also stated that Simpson would have to pay union wages and sign a contract with the Union before picketing would stop (R. 5; 29). Picketing at the construction site continued thereafter until it was enjoined by the District Court on December 4, 1959 (R. 5; 27-28).[4]

### B. The Board's Conclusions and Order

The Board found that the Union's picketing at the construction project violated Section 8(b)(4)(i)(B) of the Act, in that it was not directed at Simpson, the primary employer, but rather at Gilmore and the other sub-contractors, being designed to force them to cease doing business with Simpson. In concluding that the picketing had this illegal secondary object,

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[3] Van Scoy is also president of the Associated General Contractors of Nebraska, and president of the Omaha Employers Association of AGC (R. 31).

[4] Simpson has a shop and warehouse in Omaha which were not picketed by the Union (R. 23-24).

the Board relied on Business Agent Otte's instruction to neutral employee Tripp, on the first day of the picketing, to stop work, and on the fact that the Union continued to picket at the project even after the Simpson employees were no longer on the premises and Otte had been assured by Van Scoy that they would not be used on the job again. (R. 6.)

Moreover, the Board found that, by Otte's statement to Van Scoy that the picketing would stop only if Gilmore removed Simpson from the job, and Assistant Business Agent Schaeffer's similar statement to the president of Gilmore, the Union had coerced and restrained the neutral employers at the job site, in violation of Section 8(b)(4)(ii)(B) of the Act (R. 6).

In relevant part, the Board's order (R. 8-11) required the Union to cease and desist from inducing or encouraging the employees of Gilmore or any other employer to engage in strikes or refusals to perform services, or from threatening or restraining Gilmore or any other employer, with an object of forcing those employers to cease doing business with Simpson, or with an object of forcing Simpson to recognize or bargain with the Union unless it has been certified under Section 9 of the Act. Affirmatively, the Board's order required the Union to post appropriate notices.

### C. The Decision of the Court of Appeals

The court of appeals sustained the Board's unfair labor practice findings and enforced the Board's order with modifications not here relevant (Pet. App. A, pp. A-1—A-15).

## ARGUMENT

1. Section 8(b)(4)(i)(B) of the Act proscribes secondary, but not primary, picketing. With respect to a site where both the primary and neutral employers are at work, picketing will be regarded as primary when it is confined so far as practicable to the primary employer, and as secondary when a purposeful effort is made to direct it at the neutral employers.[5] Petitioner does not contest (see Pet. 10, n. 5) the finding of the Board, affirmed by the court below, that its picketing at the school project was secondary, and thus for the objects proscribed by Section 8(b)(4)(i)(B). It merely contends (Pet. 9-10) that the order entered by the Board to remedy that violation is excessive in that it bans legitimate primary picketing as well. There is no merit to this contention.[6]

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[5] *National Labor Relations Board* v. *Local 294, Teamsters* (C.A. 2), 47 LRRM 2085, 2086-2087, November 10, 1960; *Alpert* v. *United Steelworkers*, 141 F. Supp. 447, 452 (D. Mass.).

[6] Contrary to petitioner (Pet. 9-10), there is no connection between the issue here and that in *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board and General Electric Co.*, No. 321, this Term. The issue in *Local 761* is whether the primary employer's own premises may be treated as a common situs when independent contractors are performing work there in a regular manner, so that the union is obliged to exercise the same restraint in picketing, insofar as the contractors and their employees are concerned, as it must in other situations where the primary employer and neutral employers are at work on the same site. In the instant case, on the other hand, there is no question that the common situs rules apply, and peti-

(*a*) The order is phrased in the prohibitory language of the particular provision of the statute which was violated. Following the precise form of Section 8(b)(4)(i)(B), it bars the Union from inducing the employees of Gilmore or any other employer to strike, for an object of forcing those employers to cease doing business with Simpson (the primary employer), or forcing Simpson to recognize the Union even though it has not been certified by the Board (R. 9). Hence, as the court below correctly observed (Pet. App. A, pp. A-13—A-14): "By explicit terms, the order is designed to prohibit only that conduct which is proscribed by the statute, that is, picketing or striking for an unlawful purpose. We cannot perceive of anyone suggesting that the order can rationally be construed to prohibit lawful primary picketing or lawful primary striking."[7]

Stated otherwise, the fact that the Union has been found to have engaged in secondary picketing once

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tioner, although asserting that the Board now finds a secondary object in a common situs situation on a different basis than it did earlier, has removed this question from the case by conceding (Pet. 10, n. 5) that there was enough evidence to sustain the Board's finding of a violation of Section 8(b)(4)(i)(B).

[7] In the face of this clear statement, there is no warrant for reading the earlier language in the opinion—"Inasmuch as the evidence here fully supports the finding that Union was engaged in secondary boycott activities, in violation of the Act, we need not determine the area of Union's rights, as against Simpson, the primary employer * * *" (Pet. App. A, p. A-12)—as manifesting an intention by the court to ban, in the future, even picketing directed solely at Simpson (see Pet. 14).

does not result, as petitioner assumes, in an order banning all future picketing. To be sure, petitioner must first remedy the violation found and comply with the order entered by the Board, and, to do so may require that it discontinue picketing for a reasonable period of time so as to dissipate the effects of the illegal activity.[8] However, at least at the end of this compliance period, petitioner would be free to resume picketing without violating the Board's order, provided that it conduct the picketing in such a manner that it could not be found to have secondary objects, as was the case with the original activity. In short, the language of the order, like the comparable language of Section 8(b)(4)(i)(B), must be read as applying only to the type of conduct which that section proscribes. See *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455, 460 (C.A. 2), certiorari denied, 350 U.S. 873; cf. *National Labor Relations Board* v. *Forest Lawn Memorial Park Association*, 198 F. 2d 71, 72 (C.A. 9); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C.A. 9), certiorari denied, 338 U.S. 827.

(*b*) Petitioner's suggestion (Pet. 9-14) that the Board's order in this case represents a departure from past practice is unfounded. Since 1947, when Section 8(b)(4) was added to the Act, the Board, upon finding unlawful secondary activity either in

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[8] Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 600; *Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. 2d 922, 927-928 (C.A. 2).

a common situs situation or in other cases, has entered an order in the prohibitory terms of that section, and these orders have been consistently enforced by the courts.[9] The Board has not been, and could not wisely be, more precise because the line

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[9] See, *e.g.*, *Denver Building and Construction Trades Council*, 82 NLRB 1195, 1198 (1949), enforced, 341 U.S. 675; *International Brotherhood of Electrical Workers*, 82 NLRB 1028, 1030 (1949), enforced, 181 F. 2d 34 (C.A. 2), affirmed, 341 U.S. 694; *International Brotherhood of Boilermakers (Richfield Oil Corp.)*, 95 NLRB 1191, 1194-1195 (1951); *Service Trade Chauffeurs, Local 145 (The Howland Dry Goods Co.)*, 85 NLRB 1037, 1041 (1949), 97 NLRB 125 (1951), enforced, 191 F. 2d 65, 199 F. 2d 709 (C.A. 2); *Local Union No. 55, Carpenters (Professional and Business Men's Life Insurance Co.)*, 108 NLRB 363, 376 (1954), enforced, 218 F. 2d 226 (C.A. 10); *General Drivers, Local No. 886 (American Iron and Machine Works Co.)*, 115 NLRB 800, 801-802 (1956), enforced, 357 U.S. 93.

*General Teamsters, Local Union No. 249 (Crump, Inc.)*, 112 NLRB 311 (1955), relied on by petitioner (Pet. 11), is not to the contrary. There the Board found that the union violated Section 8(b)(4)(A), when, in the course of picketing Kaufmann, it directed that activity at Crump, an independent contractor who was doing construction work for Kaufmann on its premises. To remedy this violation, the Board entered an order in the same form as that here (112 NLRB at 313). However, the Board in its opinion stated that the order did not preclude the union "from peacefully picketing that portion of Kaufmann's premises where Crump is engaged in construction work so long as it makes clear that its dispute is with Kaufmann" (*id.* at 312). But, the reason for making explicit what would otherwise have been implicit in the Board's order was to emphasize the difference between the Board's holding and that of the trial examiner, who had outlawed all picketing at the place where Crump was working on the theory that it was not a situs which was shared with Kaufman but rather Crump's own "operating premises" (*id.* at 322-323).

between permissible primary activity and illegal secondary activity, particularly in a common situs situation, depends upon the inferences concerning the Union's objective which are drawn from a particular combination of circumstances, which fact cannot be anticipated or described in advance without an endless proliferation of details.

(*c*) Nor is a different conclusion required by the proviso added by the 1959 amendments, which states that nothing contained in Section 8(b)(4)(B) "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing", (see Pet. 11). This proviso was merely intended to set forth specifically the gloss which had previously been written upon Section 8(b)(4)(B) by administrative and judicial interpretation.[10] If an order entered under the original Section 8(b)(4) was not defective for failure to contain a reservation in favor of primary activity when that reservation was merely implicit in the statute (see n. 9, *supra*, p. 10), such omission does not make the order defective when the reservation is specifically written in the statute. Since the statute itself—formerly by implication and now explicitly—safeguards the right to engage in primary activity, it is clear that any order issued thereunder must be read in the light of that statutory limitation, and thus no substantive benefit is gained by repeating the limitation in the order itself.

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[10] See H. Rep. No. 1147, 86th Cong., 1st Sess., (1 Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) at 942).

(*d*) Finally, there is no conflict between the action of the court here and that of the Second Circuit in *McLeod* v. *Chefs, Cooks, etc., Local 89, H. & R. Emp. & B. Int. U.*, 280 F. 2d 760, 47 LRRM 2541, February 8, 1961 (Pet. 16). The latter case involved an appeal from a temporary injunction, issued under Section 10(l) of the Act, against picketing which there was reason to believe violated new Section 8(b)(7)(C). That section bans organizational or recognitional picketing carried on beyond a reasonable period of time (not to exceed 30 days) without a representation petition having been filed; however, this ban is subject to a proviso which permits "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing" is to stop deliveries. The picketing in *Chefs* was found to be within the proviso except that it had stopped deliveries in a few instances. Since the business being picketed was the Stork Club, which obtained deliveries only during certain hours, the court of appeals was of the view that, in those circumstances, it was possible to disentangle the legal picketing from the illegal picketing by merely banning picketing during the hours when deliveries were likely, and it accordingly ordered the injunctive decree drafted in those terms.[11] The situation here is

[11] It may be noted that Judge Learned Hand dissented. Chief Judge Lumbard concurred with doubts, and Judge Clark, who wrote the opinion for the court, acknowledged that perhaps the court had taken over "what partakes of

entirely different, for the Union's action at the school project, in directing its picketing at the neutral employers, colored all of the picketing there with an illegal secondary object. Moreover, as we have shown, the line between lawful primary picketing and illegal secondary picketing is not susceptible of delineation by the simple objective criterion, *i.e.*, effect on deliveries, which is provided in the case of Section 8(b)(7)(C).

2. Petitioner's challenge (Pet. 17-19) to the Board's finding, affirmed by the court below, that the statements of Union agents to Gilmore officials, that the picketing would continue unless Simpson were removed from the job (see the Statement, *supra*, pp. 4-5), constituted threats or coercion within the meaning of Section 8(b)(4)(ii)(B) raises only an evidentiary question which does not warrant review by this Court. See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491. Nor does predicating a finding of illegality on such statements result in holding the Union merely for threatening what it had a legal right to do (Pet. 18). Since the picketing in which the Union was engaged was illegal secondary, and not lawful primary, activity, the Board and the court below fairly interpreted the statements as threats to continue the same illegal picketing.

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being a legislative task" in the interest of making workable a statutory provision which would otherwise be "confusing and somewhat self-defeating" (47 LRRM at 2542).

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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No. 800

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

[illegible] Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, *Petitioner*

v.

National Labor Relations Board

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION


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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

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INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 1140, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION

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The Board's assertion (Br. p. 7; n. 6, at p. 8), that petitioner does not contest the scope of the order on the theory that the Board erred in finding that "its picketing at the school project was secondary and thus for the objects proscribed by Section 8(b)(4)(i)(B)."

is plainly unwarranted.[1] Petitioner argued specifically that insofar as the order is designed and construed to prohibit picketing of Simpson it cannot be supported either on the theory that the picketing became secondary after Simpson's laborers were removed from the project (Pet. pp. 15-16), or on the theory that the unlawful inducement of Tripp and the statements to Gilmore infused the picketing with an illegal object (Pet. pp. 11-14). The very text and context of the statement to which the Board refers (Pet. p. 10, n. 5), show that petitioner contrasted the inducement of Tripp upon which it conceded a finding of violation of Section 8(b)(4)(i)(B) properly could be based, with the picketing of Simpson, which it contended was privileged and immune. (Cf. Pet., A-7-9). Petitioner demonstrated (Pet. pp. 11-12) that under the *Moore Dry Dock* approach the Tripp and Gilmore incidents would not have "colored all of the picketing * * * with an illegal secondary object" (Op. p. 13), and would not have resulted in an order requiring the Union "to discontinue picketing * * * so as to dissipate the effects of the illegal activity" (Op. p. 9). The power of the Board to curtail primary picketing by inferring (Op. p. 11) that picketing *of* the offending employer in compliance with the *Moore Dry Dock* standards is "not directed *at*" him (Op. p. 5), petitioner certainly does contest.

Beyond that, however, petitioner contends that even if it had avowedly picketed neutral employers, as the

[1] Indeed, petitioner's second question is predicated explicitly on the contention that "the picketing which petitioner advised Gilmore would continue * * * was lawful, not unlawful, action." (Pet. p. 19). Only by treating as uncontested its assumption that the picketing was "illegal secondary and not lawful primary activity" can the Board describe that question as "evidentiary" (Op. p. 13).

unions did in *Denver* and *Langer* (Pet. 13), the Board could not enjoin it from picketing Simpson. Three members of this Court contended in *Denver* and *Langer* that in requiring the unions to treat only the primary employer as their adversary the Board had gone too far. It seems likely that if the Board had suggested that unions were to be prohibited from picketing the employer party to a primary dispute the Board would not have gotten one vote. Yet the Board admits that that is exactly what its orders are now construed to do.

While the Board stresses that the *form* of its orders remains unchanged (Op. pp. 8, 9-10), it does not deny that their substance and effect is vastly different. Thus, it concedes (Op. p. 10, n. 9), that reservation to the offending union in *Crump* of the right to picket at the common situs, provided only it made clear that its dispute was with the primary employer, merely made "explicit what would otherwise have been implicit" in the Board's order then. By contrast, its orders now are admittedly (Op. p. 9) construed to require the Union to "discontinue [all] picketing" at least "for a reasonable period of time." The admission of the court below (Pet. p. 14) which the Board would now repudiate (Op. n. 7, p. 8), serves only to confirm that, even if this prohibition were limited in duration, it could not be imposed without disregarding "the area of Union's rights as against * * * the primary employer." But Congress did not conceive of the policy against secondary boycotts as "overriding" the policy of preserving primary pressure and it "is not for administrators of the Congressional mandate to approach the [preservation of primary pressure] side of [the] line grudgingly." *Local Lodge No. 112* v. *NLRB*, 362 U. S. 411, 417, n. 7. The same grudging

attitude toward primary pressure which accounts for the Board's reversal in *General Electric* (see reply brief for Petitioner in No. 321, p. 4), accounts for the new sweep of its orders.

The Board opposes exemption of primary picketing from secondary boycott orders on the ground that (Op. pp. 13, 11), "the line between lawful primary picketing and illegal secondary picketing is not susceptible of delineation by * * * objective criteri[a]". But drawing that line by objective criteria is exactly what the Board did in *Moore Dry Dock* and exactly what this Court, in *Denver*, 341 U. S. 657, 692, approved. If curtailment of picketing of the primary employer "is a consequence" of making subjective inferences as to "motive the test of legal wrong" (*NLRB* v. *Universal Camera Corp.*, 2 Cir., 179 F. 2d 749, 755, rev'd on other grounds, 340 U. S. 474), that is all the more reason why primary picketing must be distinguished from secondary picketing on objective grounds which are "described in advance" (Op. p. 11).

The assertion (Op. p. 9), that the ban upon primary picketing is limited to "a reasonable period of time" and is grounded in need "to dissipate the effects of the illegal activity" is entirely a figment of Board counsel's fertile imagination. Neither the limitation nor the theory was suggested to the court below nor does it find support in the terms of the order or in a single statement or implication in any Board or court decision. The Board itself said in this case (Pet. p. A-8), that its order was adopted not only "to remedy the unfair labor practice" but to "otherwise effectuate the policies of the Act." It is the Board's current view, as shown by the cases cited in the petition, p. 14, that those policies entail forfeiture of the right to

picket the primary employer for engaging in any secondary activity.

*Chenery*[2] aside, however, even as so confined and grounded, the prohibition of primary picketing could not survive. For the Board is not empowered to remedy unfair labor practices "by actually defeating the statutory rights of * * * employees" or by subjecting unions "to disabilities not intended by Congress * * *". *NLRB* v. *District 50, UMW*, 355 U. S. 453, 460, 463. Congress' enactment of the proviso to Section 8(b)(4)(i)(B), which assures that the right to engage in primary picketing shall under no circumstances be impaired, reinforces the plain implication of *Denver* and *Langer* (Pet. p. 13), that prohibition of primary picketing, even temporarily, is not one of the consequences which Congress authorized the Board to impose as a result of violation of Section 8(b)(4)(i)(B). Cf. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 73.

The Board does not deny that the question presented, affecting as it does every order in every common situs case, is of major national importance. The only defense the Board offers is its repudiation of the objective criteria approach of *Moore Dry Dock*. The claim of power to repudiate *Moore Dry Dock* despite this Court's approval underlies the Board's defense in *General Electric*. See Brief for the Board in No. 321, this term, p. 24, and reply brief for Petitioner, pp. 7-9. Rejection of the Board's defense in *General Electric* would destroy the predicate for its attempt (Op. pp. 12-13), to distinguish *McLeod* v. *Chefs, Cooks, Etc.*, 280 F. 2d 760, 47 LRRM 2541, and for its attempt to sustain the current construction of its orders.

[2] *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87-95.

For the foregoing reasons the petition for certiorari should be granted and the Board's order appropriately modified.

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